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January 23, 2018

Submitted via FOIA Online (<https://foiaonline.regulations.gov>)

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

Re: Request Under Freedom of Information Act (Fee Waiver/Limitation Requested)

Dear Freedom of Information Officer:

Ecological Rights Foundation ("EcoRights"), via their public interest counsel at Environmental Advocates, requests all documents constituting, memorializing, explaining or commenting upon the following:

- (1) All documents created by or provided to the U.S. Environmental Protection Agency or any employee or official of the U.S. Environmental Protection Agency (collectively "EPA") since January 20, 2017 constituting or memorializing any and all communications between the EPA and any officer or employee of Definers Corp., Definers Public Affairs, America Rising, America Rising Squared, or any other affiliate (collectively, "Definers et al."). Such documents include but are not limited to the following documents created by or provided to EPA since January 20, 2017:
 - a. This request shall include all documents constituting, memorializing, explaining or commenting upon the December 7, 2017 contract executed between Definers Corp. and the Environmental Protection Agency ("EPA") (#EP18H000025) ("the Contract") including but not limited to all documents constituting, memorializing, explaining or commenting upon the bidding process that culminated in the Contract, including any bid or proposal submitted by Definers Corp. or any solicitation thereof; all documents memorializing, explaining or commenting upon the purpose of the Contract and duties to be performed under the Contract; the full

Contract including any addenda or attachments; documents memorializing, explaining or commenting upon funds awarded or due under the Contract; all documents constituting, memorializing, explaining or commenting upon the decision to rescind the Contract.

- b. This request shall also include any and all documents constituting, memorializing, explaining or commenting upon Freedom of Information Act (“FOIA”) requests submitted by Definers, et al. to EPA, any responses to such FOIA requests issued by EPA (including any response concerning any fee waiver requests by Definers, et al. submitted in conjunction with their FOIA requests), and any communications regarding such FOIA requests. This request shall also include any agreements or discussions between EPA and Definers, et al., constituting, memorializing, explaining or commenting upon the reasons for or any decisions to issue FOIA requests for the purposes of gathering information on EPA employees, climate scientists, activists, or others.
 - c. This request shall also include any and all documents memorializing, explaining or commenting upon funds paid to Definers, et al., or any officer or employee thereof by EPA or the U.S. Treasury.
 - d. This request shall also include any and all communications between EPA employees and any officer or employee of Definers, et al., including but not limited to all communications between EPA employees and Allan Blustein.
- (2) All documents created by or provided to EPA since January 20, 2017 constituting, memorializing, explaining or commenting upon any and all communications between presidential appointees of the Trump administration (including but not limited to Administrator Pruitt and any other presidential appointee within the EPA) and EPA employees, and any and all internal communications between EPA employees, constituting, memorializing, explaining or commenting upon any request, directive, or instructions to investigate its own employees for their expressed positions or expressed views concerning the appointment of Administrator Pruitt or any other Trump administration presidential appointee or any policies that Administrator Pruitt or other Trump administration presidential appointee has suggested or announced for the EPA to consider or to pursue (hereinafter “Political Expressions,”). Such documents include but are not limited to the following documents created by or provided to EPA since January 20, 2017:
- a. Any and all documents constituting, memorializing, explaining or commenting upon contracting with an outside entity for this purpose;

- b. Any and all documents constituting, memorializing, explaining or commenting upon the use of public funds to carry out such investigations;
 - c. Any and all documents constituting, memorializing, explaining or commenting upon investigating EPA employees through FOIA requests;
 - d. Any and all documents constituting, memorializing, explaining or commenting upon commencing any such investigations or the results or findings from any investigations;
 - e. Any and all documents constituting, memorializing, explaining or commenting upon any efforts to identify EPA employees to investigate for their Political Expressions.
- (3) All documents created by or provided to EPA since January 20, 2017 constituting, memorializing, explaining or commenting upon any and all communications between presidential appointees of the Trump administration (including but not limited to Administrator Pruitt and any other presidential appointee within the EPA) and EPA employees and any and all internal communications between EPA employees constituting, memorializing, explaining or commenting upon Definers, et al., or any officer or employee thereof. This request includes but is not limited to any and all draft or final orders, memorandums, or guidance, from the Office of the President, his staff, the EPA, EPA personnel and/or staff, or other executive agencies, constituting, memorializing, explaining or commenting upon how the EPA should, must, or must not engage with Definers, et al., or any officer or employee thereof. Such documents include but are not limited to the following documents created by or provided to EPA since January 20, 2017:
- a. This request shall include any instructions, directives, or requests to work with Definers, et al.; any documents constituting, memorializing, explaining or commenting upon the reasons or purpose for working with Definers, et al.; and any other documents constituting, memorializing, explaining or commenting upon Definers, et al., not covered herein.
 - b. This request shall include all documents constituting, memorializing, explaining or commenting upon the decision to award the Definers Corp. contract on a sole-source basis; any internal discussions regarding hiring Definers Corp.; any internal discussions regarding canceling the contract; and any other documents constituting, memorializing, explaining or commenting upon any instructions, directives, or requests to work with Definers, et al.

We trust that the government will reach a determination on this request within FOIA's twenty working day deadline and will limit any possible withholding to those

documents that the government can meet its burden to show are truly exempt from disclosure and the release of which would cause foreseeable harm.

For purposes of this request “documents” means “all written, typewritten, drawn or printed material or record of any type or description and all information kept or recorded on magnetic or electronic media, including, without limitation, correspondence, letters, agreements, contracts, memoranda of agreement or understanding, electronic mail (including both messages sent and received from government personnel), telegrams, inter- and intra-office communications, forms, reports, studies, working papers, handwritten or other notes, phone records, logs, diaries, minutes, spreadsheets, computation sheets, data sheets, transcripts, drawings, sketches, plans, leases, invoices, index cards, checks, check registers, maps, charts, graphs, bulletins, circulars, pamphlets, notices, summaries, books, photographs, sound recordings, videotapes, rules, photocopied or computer-related materials, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations of them, and all forms of written or recorded matter to which [the government has] access or of which [the government has] any knowledge”).

FOIA requires that an agency disclose documents to any person except where the document falls under a specifically enumerated exemption. 5 U.S.C. § 552 (2002). “[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act”; “[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.” *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 7-8 (U.S. 2001) (internal citations omitted). The courts have emphasized the narrow scope of these exemptions and “the strong policy of the FOIA that the public is entitled to know what its government is doing and why.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980). Further, under the recent amendments, 5 U.S.C § 552(a)(8)(A) now provides that (1) an agency shall withhold information only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b) or disclosure is prohibited by law; (2) the agency shall consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and (3) the agency shall take reasonable steps necessary to segregate and release nonexempt information.

Thus, the government has a duty in preparing responses to EcoRights’ FOIA request not to withhold documents unless foreseeable harm exists, to consider partial disclosure, and to take reasonable steps to segregate nonexempt information. Exemptions are read narrowly and the government bears the burden of proving exemptions apply. 5 U.S.C. § 552(a)(4)(b); *see Milner v. Dep’t of the Navy*, 562 U.S. 562, 563 (U.S. 2011). Agencies “should not withhold information simply because [they] may do so legally. . . For every request, for every record reviewed, agencies should be asking ‘Can this be released?’ rather than asking ‘How can this be withheld?’” *See also Mobil Oil Corp. v. U.S. E.P.A.*, 879 F.2d 698, 700 (9th Cir. 1989) (“The exemptions are permissive, and an

agency may voluntarily release information that it would be permitted to withhold under the FOIA exemptions.”)

We request that the government provide electronic copies of its response to this request – as well as any responsive documents that may be transmitted via e-mail – to me at the following e-mail addresses:

Christopher Sproul: csproul@enviroadvocates.com
Heather Kryczka: heather@enviroadvocates.com
Molly Coyne: mcoyne@enviroadvocates.com

Please send any documents that must be sent via regular mail to the following address:

Christopher Sproul
Environmental Advocates
5135 Anza St.
San Francisco, California, 94121

Your staff may contact me at (630) 544-9977 or heather@enviroadvocates.com to further discuss your response to this request. Thank you for your prompt attention to this matter.

Sincerely,



Heather Kryczka
Counsel for Ecological Rights Foundation

Attachment 1
Fee Waiver Request

Attachment to Freedom of Information Act (FOIA) Request Letter: Fee Waiver Request

Pursuant to 40 C.F.R. section 2.120(d), the U.S. Environmental Protection Agency (EPA) applies a six factor test in determining whether to grant a fee waiver for FOIA requests. Ecological Rights Foundation (“EcoRights”) addresses each of these six factors below. As demonstrated below, EcoRights should be granted a fee waiver.

1. The subject matter of the requested records must specifically concern identifiable operations or activities of the government. A request for access to records for their informational content alone does not satisfy this factor.

EcoRights’ Response: EcoRights’ FOIA request seeks documents relating to communications between the Environmental Protection Agency (EPA) and officers or employees of Definers Corp., Definers Public Affairs, America Rising, and America Rising Squared (collectively, “Definers et al.”) since January 20, 2017. The request specifically seeks documents relating to the December 7, 2017 contract between the EPA and Definers’ Corp. that was executed and later rescinded, documents related to FOIA requests submitted by Definers et al., and documents relating to funds paid by EPA to Definers et al. EcoRights also seeks documents related to internal communications within EPA or between EPA and Trump administration officials related to Definers et al. that have occurred since January 20, 2017, specifically requesting communications related to the purpose of the December 7, 2017 contract with Definers Corp. and any discussions related to the prospect of the EPA working with Definers et al., or any record of EPA providing information to any officer or employee of Definers et al. EcoRights’ FOIA request also seeks documents relating to any discussions or instructions by Trump administration officials and/or EPA employees related to the Political Expressions of EPA employees. Accordingly, EcoRights’ request meets this criterion.

2. For the disclosure to be likely to contribute to an understanding of specific government operations or activities, the releasable material must be meaningfully informative in relation to the subject matter of the request.

EcoRights’ Response: The documents EcoRights requests constitute the best available evidence of the circumstances surrounding the drafting, execution and rescission of the contract between EPA and Definers Corp. dated December 7, 2017, as well as the reasons for executing the contract on a non-competitive, sole-source basis. The documents EcoRights requests also constitute the best available evidence of the efforts of employees and/or officers of Definers et al. to investigate the Political Expressions of EPA employees, and any efforts by Trump administration officials or the EPA to cooperate in and/or solicit such investigations. These documents will inform EcoRights and the public of the efforts of the EPA under the current administration to work together with Definers et al., e.g., by cooperating with the efforts of Definers Corp. attorney Allan Blutstein to submit FOIA requests on individual EPA employees, and any other cooperative efforts to identify, investigate, or harass EPA employees based on their Political Expressions. The

documents requested also constitute the best available evidence to reveal treatment of EPA employees' Political Expressions. Further, these documents will provide the best available evidence of the current EPA's practices with regards to awarding contracts, particularly any preferences given to Definers et al. or reasons for awarding the media contract on a sole-source basis.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. One's status as a representative of the news media alone is not enough.

EcoRights' Response: Disclosure of the documents will promote the understanding of the general public in a significant way because EcoRights will analyze the information and make its conclusions known to our members, other environmental groups nationwide, and the public at large via press releases and by posting our analyses of the information on one or more internet web sites or citizen group email broadcast "systems," such as the Clean Water Action Network. There has been significant environmental group and media focus on whether the current administration is targeting EPA employees based on their Political Expressions, and whether this effort is designed to continue to affect enforcement of environmental laws as part of an overall approach of modifying environmental laws and programs to create a more favorable business climate for certain business sectors. The documents requested will allow EcoRights to provide meaningful "hard" data to the environmental community and the media on these topics.

Disclosure will further allow interested members of the public to assess whether EPA is using public funds to investigate EPA employees based on their Political Expression. The easiest way for members of the public to learn this quickly would be by reviewing EPA communications related to the FOIA requests submitted by employees and officers of Definers et al., reviewing instructions by Trump administration officials and/or EPA to conduct such investigations, and to review the documents describing the purpose of the December 7, 2017 contract with Definers Corp., documents that all currently reside within the EPA.

4. The disclosure must contribute "significantly" to public understanding of government operations or activities.

EcoRights' Response: Disclosure of the requested information will significantly contribute to public understanding of government operations. Specifically, the information will demonstrate whether EPA is engaging in actions directed at responding to its employees' Political Expression or to promote the interests of groups that have been critical of EPA's past actions. This will further enhance public understanding of the ability of EPA employees to execute their duties and to assess the capacity of the EPA as an agency overall to fulfill its obligations to enforce and implement federal environmental laws.

In addition, disclosure of the requested information will enhance public understanding of whether or not the EPA is awarding noncompetitive contracts based on political preferences. Shedding light on the connections between Trump administration officials and/or EPA employees and Definers et al. serves the crucial function of allowing the public to hold Administrator Pruitt and others accountable for expenditures of public funds.

Threats to our environment such as water and air pollution adversely affect millions of people throughout the United States, and adequate, efficient implementation and enforcement of environmental laws is critical for the public health of millions. EcoRights has a demonstrated ability to disseminate the problematic features of government activities to a wider public audience, by litigation as well as the other means. Factors indicating an ability to disseminate information to the public include publication on an organization's website and the ability to obtain media coverage. *Judicial Watch v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

EcoRights' analyses will be disseminated via press releases as well as posted on EcoRights' web sites (<http://www.ecorights.org>) and likely the web sites of other environmental groups. EcoRights has a proven track record of obtaining press coverage of the environmental issues it publicizes. Generally, EcoRights obtains press coverage in the local and national media, including newspapers and radio stories. For example, EcoRights' recent filing of an ESA citizen suit concerning Stanford University's operations in the San Francisco Bay Area watershed was covered by several San Francisco Bay Area newspapers, KQED radio, and a local television station. EcoRights regularly issues press releases and includes them on its website. EcoRights has demonstrated its ability to disseminate information to the public, as evidenced by its upkeep of its website and social media, its mention on other environmental groups' websites, and its ability to attract press coverage for its various lawsuits.

5. The extent to which disclosure will serve the requester's commercial interest, if any.

EcoRights' Response: EcoRights is a community-based educational nonprofit corporation committed to the protection, preservation, and restoration of the environment and endangered and threatened species. For over 15 years, EcoRights has been devoted to furthering the rights of all people to a clean, healthful, and biologically diverse environment. To further EcoRights' environmental advocacy goals, EcoRights actively seeks federal and state agency implementation of state and federal water quality and wildlife laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members. Accordingly, EcoRights has no commercial interest in the information requested. EcoRights seeks the information solely to determine the effect of the current EPA's policies related to Political Expressions of its employees and the EPA's relationships to Definers et al. on the EPA's completion of its statutory duties and therefore aid in EcoRights' efforts to advocate that the appropriate state, federal, or private entities take needed actions to protect our environment and natural resources.

EcoRights has no financial interest in the information sought or any enforcement actions that may result. EcoRights' goal in urging enforcement of environmental laws is not private financial gain, but rather vindication of the larger public interest in ensuring that the EPA is operating in such a way that it can achieve compliance with environmental laws designed to protect our environment, wildlife, health, and natural resources.

6. The extent to which the identified public interest in the disclosure outweighs the requester's commercial interest.

EcoRights' Response: EcoRights has no commercial interest in the requested information, as discussed above. Accordingly, the identified public interest in the disclosure of the requested information discussed above necessarily outweighs any commercial interest in this request. For the above reasons, EcoRights respectfully requests a fee waiver pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 15 C.F.R. § 4.11(k) for all copying costs, mailing costs, and other costs related to locating and tendering the documents.

We also base our request for a fee waiver on the following additional authorities.

The law **requires** that records be furnished without charge or at a reduced charge when requesters are able to demonstrate that (1) disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(4)(a)(iii); 40 C.F.R. 2.107(l)(1); *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003) [emphasis added].

(a) **Rule of liberal construction.** FOIA's fee waiver provision is to be liberally construed in favor of noncommercial requesters. *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). The major purpose of the 1986 amendments was to remove roadblocks and technicalities that agencies have used to deny fee waivers. *McClellan*, 835 F.2d at 1284. A request for fee waiver need only be reasonably specific and nonconclusory. *Judicial Watch, Inc. v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

Requesters make a prima facie case for a fee waiver when they specify why they want the administrative record, what they intend to do with the information, and to whom they will distribute the information. *Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d 53, 55 (9th Cir. 1997). The burden then shifts to the agency to establish that the denial is warranted. *Id.* In denying a fee waiver request, the agency may not "hang [its] hat on a single factor" but must assess all of the pertinent factors. *Id.* Moreover, a reviewing court owes no particular deference to an agency's restrictive interpretation of FOIA. *See Tax Analysts v. Commissioner*, 117 F.3d 607, 613 (D.C. Cir. 1997).

(b) **Public interest purpose.** EcoRights falls squarely within the category of “public interest” requesters intended to benefit from the 1986 amendments of FOIA, which expanded FOIA fee waiver provisions. This amendment was intended precisely to facilitate informational access by citizen watchdog groups that will monitor and challenge government activities. *See Better Govt. Ass’n v. Department of State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986). Indeed, this provision should be construed as a presumption that such requesters are entitled to a fee waiver, especially if the requesters will publish the information or otherwise make it available to the general public. *See Ettlinger v. Fed. Bureau of Investigation*, 596 F.Supp. 867, 873 (D. Mass. 1984).

The legislative history of the fee waiver provision indicates that “A requester is likely to contribute significantly to public understanding if the information is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H94646 (Reps. English and Kindness). Courts have cited this legislative intent as a standard for determining that a requester qualifies for a fee waiver. *See McClellan*, 835 F.2d at 1284-86.

For the above reasons, EcoRights respectfully requests pursuant to 5 U.S.C. section 552(a)(4)(A)(iii) and 40 C.F.R. section 2.120(d) a fee waiver for all copying costs, mailing costs, and other costs related to locating and tendering the documents.